No. 00-1845

In The

Supreme Court of the United States

JAMES D. McCALL; STANLEY R. COLLINS; E.E. BOWMAN; J. WILLIAM HUFF; MICHAEL N. DANA; O. J. NORMAN; MURL C. LINKE; JOSEPH R. ROBERTS; LAWRENCE S. KISER; NORMAN D. BREHM; WILLIAM S. BRANCH; JEROME P. O'CONNOR; WILLIAM T. DAVIDSON; BART A. WIESLEY; W. H. TICEN; BETTY TITCHENER, executrix of Gerald Titchener's estate; and GEORGE D. STARIHA,

Petitioners,

v.

BURLINGTON NORTHERN/SANTA FE COMPANY f/k/a Burlington Northern Railroad Co.; BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1995 VOLUNTARY SEPARATION PAY PLAN; BURLINGTON NORTHERN, INC. PENSION PLAN; TRUSTEES OF THE BURLINGTON NORTHERN, INC. PENSION PLAN; BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; TRUSTEES OF THE BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; ALAN W. SPEAKER; JEANNE MICHALSKI; and DONALD SCOTT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a fiduciary breach its fiduciary duties under ERISA by truthfully apprising employee benefit plan participants about management's intent regarding future benefit plans?

LIST OF PARTIES

The caption of the case includes the names of all parties.

Respondent The Burlington Northern and Santa Fe Railway Company, formerly known as Burlington Northern Railroad Co., is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation.

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Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq* ..... ***passim***

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari. The lower courts held that respondents breached no fiduciary duties under ERISA by truthfully apprising employee benefit plan participants about management's intent regarding future benefit plans. That holding is squarely in accord with Supreme Court and court of appeals precedent and therefore creates no conflict among the circuits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 237 F.3d 506 and is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari. The order denying petitioners' petition for rehearing en banc is reported in table form at 252 F.3d 437 and reproduced in the Appendix at page 38.

The decision of the United States District Court for the Northern District of Texas is reported at 61 F. Supp.2d 563 and is reprinted at page 17 of the Appendix.

STATEMENT OF THE CASE

In 1991, due to a severe and lengthy economic recession and competition from other carriers, the management of respondent Burlington Northern Railroad Company ("BN") concluded that the company needed to

reduce its expenses significantly. *Appendix ("App.")* 18.[1] BN first attempted to decrease overall costs without reducing the number of employees. *Id.* at 2. Management later concluded, however, that if expenses were to be reduced to an acceptable level, a reduction in the company's workforce was unavoidable.

Donald W. Scott, BN's Senior Vice President of Human Resources, was the senior executive officer at BN charged with the creation, design, and implementation of a method for reducing the workforce. *Id.* The goal was to reduce the number of employees by 500. *Id.* Scott briefed BN's Chief Executive Officer and other senior officers of the company on the various methods by which employment expenses could be reduced. After considering whether simply to lay off employees or to offer a program of severance benefits to encourage employees to resign, Scott decided to attempt to reduce the workforce to its targeted level through a voluntary separation pay plan. That concept became the 1991 Separation Pay Plan (the "1991 Plan"). *Id.* at 2-3.

In Scott's prior experience with voluntary separation pay plans at BN, employees often seemed unwilling to take advantage of the plans because they assumed that there might be another, more generous pay plan adopted in the near future. *Id.* at 3. Unfortunately, some of those employees became subject to involuntary lay off because of their unfounded assumptions. Scott recommended adopting a plan that would be as generous as possible in

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[1] This brief will also refer to respondents collectively as "BN."

the hope that it would accomplish the targeted voluntary workforce reduction through voluntary, as opposed to involuntary, means. *Id.* at 28. If the 1991 Plan did not achieve the workforce reduction goals, BN would strongly consider further reduction by involuntary layoffs, but not by another voluntary plan with better benefits than those contained in the 1991 Plan. Other BN managers concurred with this proposal.

Scott also had the overall responsibility for drafting the summary plan description ("SPD") for the 1991 Plan. He decided to include with that SPD a series of questions and answers designed to answer common employee questions that he anticipated might be asked about the 1991 Plan. One of the questions and answers (the "1991 Q & A") was the following:

> Q: Will there be another opportunity to participate in a separation pay plan after this one?
>
> A: The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not decided whether there will be any additional voluntary separation plans. However, management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.

Id. at 3. The answer quoted above was true. *Id.* at 6.

Each of the petitioners was employed by BN in 1991 and voluntarily elected to participate in the 1991 Plan.[2] *Id.* at 3. Each petitioner received all the benefits under the 1991 Plan as described in that Plan, and most of them have been receiving retirement benefits provided by BN since that time.

Unfortunately, the number of employees who elected to participate voluntarily in the 1991 Plan fell short of the goal of reducing the workforce by 500 people. True to its word, BN did not institute another voluntary separation pay plan. Instead, BN instituted an involuntary layoff to achieve the necessary reductions. The benefits laid-off employees received were less than those offered in the 1991 Plan.

Some four years later, under a new management team and in response to two new events, BN adopted the 1995 Voluntary Separation Pay Plan (the "1995 Plan"). *Id.* at 3-4. This plan was instituted as a result of an "activity value analysis" of BN conducted by an outside consultant. The consultant concluded that BN could do the same amount of work with fewer number of people in its employ if certain organizational changes were made. *Id.* at 19. In addition, BN at the time was in the process of merging with the Atchison, Topeka, and Santa Fe Railway, and BN determined that the merged company (The Burlington Northern and Santa Fe Railway Company) would require fewer employees than the total number

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[2] The petition says petitioners relied on the 1991 Q & A in deciding to participate in the 1991 Plan. *Petition* at 5. Petitioners' alleged reliance is disputed, however, and neither the district court nor the court of appeals addressed that issue.

that were then currently employed collectively by both companies. Neither of these events was even foreseen in 1991, much less a factor in the decision to offer the 1991 Plan. The merger, for example, was not proposed until 1994 and not approved by the regulatory authorities until 1995.

Some four years into their retirement, upon learning of the 1995 Plan three of the petitioners brought claims for benefits under the 1995 Plan. Their claims were denied by the plan on the grounds that they had received all the benefits they were entitled to under the 1991 Plan, and they were not eligible to participate in the 1995 Plan because they were not active employees when that plan was offered. *Id.* at 19.

Petitioners brought suit in the United States District Court for the Northern District of Texas under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, asserting claims for breach of fiduciary duty, wrongful denial of benefits, estoppel, and interference with plan benefits. The district court entered summary judgment for BN. The United States Court of Appeals for the Fifth Circuit affirmed finding, among other things, that the 1991 Q & A was true. District Judge Kazen, sitting by designation, dissented on the grounds that he believed that there was a genuine issue of fact precluding summary judgment. A petition for rehearing en banc was denied because no member of the panel or judge in the Fifth Circuit requested that the court be polled for rehearing en banc.

SUMMARY OF THE ARGUMENT

In an attempt to obtain certiorari review, petitioners say that the Fifth Circuit's opinion in this case "is contrary to the decisions of every circuit (including the Fifth Circuit) that have addressed the binding nature of statements made in a summary plan description." *Petition* at 9. They also suggest that the Fifth Circuit refused to grant a remedy for a violation of ERISA. Petitioners' portrayal of the Fifth Circuit's decision, however, simply ignores the grounds for the court of appeals' decision. This case turns not on any disputed legal principle, but on Supreme Court precedent and a single, undisputed fact: the 1991 Q & A was true.

ARGUMENT

A. BN breached no fiduciary duty in denying petitioners' claims for benefits under the 1995 Plan or in drafting or distributing the 1991 Q & A.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), has "six carefully integrated civil enforcement provisions," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), that were crafted with "deliberate care." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, the Court has admonished courts not to "tamper with an enforcement scheme crafted with such evident care." *Russell*, 473 U.S. at 147. Any meaningful analysis of petitioners' arguments in their petition, therefore, must begin – as the district court's and the court of appeals' did – by identifying the civil enforcement provisions of ERISA petitioners

seek to invoke and the actions of BN that petitioners say violated the law.

The petition alludes only to petitioners' claim for breach of fiduciary duty under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Evidently, therefore, they do not believe that their other claims, including their claim to recover benefits under the terms of the plan under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), merit review by the Court. The two actions petitioners say constituted breaches of fiduciary duty are: (1) the denial of their request for "better" benefits under the 1995 Plan; and (2) the drafting or distribution of the 1991 Q & A.[3]

The petition simply ignores the Fifth Circuit's ground for ruling against petitioners on the former claim. The court of appeals disposed of that claim on the ground that where a participant seeks to recover benefits that he claims he was entitled to receive under an employee benefit plan, the claim is cognizable as a claim to recover benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), not as one for breach of fiduciary duty under section 502(a)(3). *App.* at 7-8. The Fifth Circuit's conclusion was compelled by the Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). There, in recognizing a cause of action under section 502(a)(3) to recover

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[3] Before the district court and the court of appeals, petitioners also argued that BN breached its fiduciary duties by adopting the 1995 Plan. They do not appear to make this argument in their petition, presumably because, as the Fifth Circuit found, *App.* at 7, an employer acts as a settlor, not as a fiduciary, in adopting, amending, or terminating an employee benefit plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-90 (1996).

"appropriate equitable relief" for breach of fiduciary duty, the Court emphasized that it was not thereby allowing a beneficiary to "repackage his or her 'denial of benefits' claim as a claim for 'breach of fiduciary duty.' " *Id.* at 513. This is so, the Court said, because "Congress elsewhere provided equitable relief" so further equitable relief would not be "appropriate." *Id.* at 515. Not surprisingly, then, there is no conflict among the circuits on this issue; the cases are in accord that a plaintiff may not disguise a section 502(a)(1)(B) claim in "fiduciary clothing." *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474-75 (9th Cir.), *cert. denied*, 522 U.S. 996 (1997); *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 713 (4th Cir. 1996); *Wald v. Southwestern Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996); *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1335 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992). Thus, petitioners' meritless claim that BN breached its fiduciary duties by denying their claim for benefits plainly does not merit certiorari review.

The law that applies to petitioners' other claim also is clear, at least insofar as it applies here. Petitioners claim that BN breached its fiduciary duty by drafting or distributing the 1991 Q & A because the 1991 Q & A was not "accurate."[4] *Petition* at 16. Evidently petitioners believe

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[4] Petitioners also say "[t]he evidence shows both that BN did not investigate the accuracy of its statements at the time it included them in the 1991 SPD, nor did it ensure that the statements were in fact accurate." *Petition* at 16. Petitioners do not explain what sort of "investigation" could or should have been conducted or what facts it would have discovered. In any event, if, as both courts below found, the 1991 Q & A was true,

that BN breached its fiduciary duty because the statement could be misconstrued as a promise that BN would never, until the end of time, under any circumstances offer a severance pay plan with better benefits than those provided in the 1991 Plan. In any event, eight courts of appeals have addressed the question of the proper analysis of a claim that a fiduciary made misleading (or even false) statements about possible future employee benefits. Seven of them have come to the same conclusion: there can be no breach of fiduciary duty in making representations about a future plan until and unless that plan has been under "serious consideration." *See Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (9th Cir. 2000) (en banc); *Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997); *Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997); *Muse v. IBM Corp.*, 103 F.3d 490, 493 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("*Fischer II*"); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Barnes v. Lacy*, 923 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991). This test balances the tension between an employee's right to information and an employer's need to operate on a day-to-day basis. *Fischer II*, 96 F.3d at 1539. It embodies the notion that "an employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous employee that a better deal might one day be proposed." *Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995). And it

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then there was nothing further to investigate and no result of any further investigation would have changed the 1991 Q & A.

recognizes that employers do not have a " 'duty of clairvoyance,' *i.e.*, to predict accurately the future availability of benefits." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

One court has taken a slightly different approach, although any differences between the approaches are inconsequential here. In *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), the Second Circuit concluded that "serious consideration" of a change is not necessarily a prerequisite to a finding of breach of fiduciary duty regarding statements about plan changes. *Id.* at 123. Instead, the court concluded that statements are actionable if they are (i) material (ii) affirmative (iii) misrepresentations about present facts. *Id.* at 122. Whether a change is under serious consideration, the court concluded, is one factor affecting materiality. *Id.* at 123. But the court acknowledged that mere mispredictions are not actionable. Rather, only false statements about future benefits *couched as a guarantee* can be a breach of fiduciary duty. *Id.* at 125.

Any differences between *Ballone* and the "serious consideration" standards are immaterial here because BN prevails under both. The district court expressly so found. *App.* at 23-29. The Fifth Circuit effectively did so as well. As the court of appeals said, it is undisputed "that the 1995 Plan was not conceived until several years after [petitioners] made their decision to retire." *App.* at 5-6. Thus, BN breached no fiduciary duty under the "serious consideration" test. The Fifth Circuit also found, on the undisputed facts, that the 1991 Q & A was true. Thus, BN breached no fiduciary duty under *Ballone* by misrepresenting material present facts. Certiorari review

of petitioners' claim that BN breached its fiduciary duties in drafting or distributing the 1991 Q & A therefore also is unwarranted.

B. The decision of the Fifth Circuit creates no conflict among the circuits.

Ignoring the dispositive lines of authority, petitioners repeatedly say that the court of appeals' opinion in this case conflicts with a number of cases holding that statements in summary plan descriptions are "binding." The argument is a curious one given that the Fifth Circuit's opinion *explicitly reaffirms* the principle that petitioners say it repudiated – it says that "the SPD is binding and if there is a conflict between the SPD and the terms of the plan itself, the SPD controls." *App.* at 9.

In any event, the principle has nothing to do with the fiduciary duty claims raised in the petition. All of the cases that petitioners say support their central theory – *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); and *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) – involved claims to recover benefits under section 502(a)(1)(B) and merely stand for the proposition that in such an action, where a participant is entitled to a benefit under the terms of a summary plan description but not under the terms of the

plan document itself, the terms of the summary plan description control. The reason courts have adopted the rule is clear: where a plan has both a formal plan document and a summary plan description, only the latter typically is distributed to participants. *See* 29 U.S.C. §§ 1022(a), 1024(b) (requiring that summary plan descriptions be distributed). Thus, it would be unfair for the plan to deny a claim for benefits based on an undisclosed provision in the plan document that contradicts a provision in the summary. *See, e.g., Hansen*, 940 F.2d at 982-83.

These principles do not apply here. The claim petitioners say merits certiorari review is a claim for breach of fiduciary duty, not one to recover benefits. This case involves only one document, not two, and that document was distributed to participants. BN does not claim that petitioners are not entitled to benefits based on the language of some undisclosed document. In other words, the principle that a summary plan description is "binding" simply does not answer the question here: whether BN, by making the statement in the 1991 Q & A, breached its fiduciary duties under ERISA.

C. Petitioners are entitled to no remedy because there was no violation of ERISA.

In part III of the petition petitioners suggest that the Fifth Circuit found that BN "breached" the 1991 Q & A but held that ERISA provides no remedy for the breach. Petitioners say that, as "appropriate equitable relief" under section 502(a)(3) of ERISA, the court should have awarded them not only the "better" benefits under the 1995 Plan, but also reinstatement from 1991 to 1995 and

all attendant back pay and benefits. Once again, however, petitioners ignore the basis of the Fifth Circuit's ruling and confuse ERISA's different civil enforcement provisions.

The portion of the court of appeals' opinion on which petitioners base their argument is the court's discussion of petitioners' claim under section 502(a)(1)(B) of ERISA, not their claim for breach of fiduciary duty. A claim under section 502(a)(1)(B) is "to recover benefits . . . *under the terms* of [the] plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Generally, a claim under that section is reviewed the same as any other contract claim: by looking to the terms of the plan and other manifestations of the parties' intent. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989). The court of appeals did not uphold summary judgment on petitioners' section 502(a)(1)(B) claim on the grounds that ERISA fails to provide a remedy for a violation of the statute. Instead, the Fifth Circuit concluded that that claim was meritless because the 1991 Q & A simply does not say what petitioners wish it said. It does not say "if there are ever any plans with benefits better than the current plan, you will be entitled to benefits under that plan." *App.* at 9-10. The Fifth Circuit merely construed the 1991 Q & A to mean what it says.

Indeed, although petitioners assert that "the Fifth Circuit should have strictly held BN to the terms of [its] promise" not to provide better benefits in the future, *Petition* at 12, if the court had done so it would have prohibited BN from adopting the 1995 Plan, not required BN to reinstate petitioners and give them better benefits. In other words, the 1991 Q & A was simply a truthful

statement of BN's intent at the time about future benefit plans, not a promise of benefits. Such truthful statements, the courts of appeals agree, do not violate ERISA. *See, e.g., Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 990 (3d Cir. 1995); *Barnes v. Lacy*, 923 F.2d at 543-44.

CONCLUSION

The court of appeals' opinion in this case creates no conflict among the circuits. Judgment for respondents on petitioners' breach of fiduciary duty claims was dictated by precedent of the Court and under the standards adopted by the courts of appeals. The petition for writ of certiorari should be denied.

Respectfully submitted,

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